Public Prosecutor v Nazarudin bin Ahmad & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45-6-91
VISU SINNADURAI J
19 MARCH 1993

Criminal Procedure *— Sentencing — Culpable homicide — Plea of guilty — Court's discretion to grant credit or discount when plea of guilty has been entered — Penal Code (FMS Cap 45) s 304*

Criminal Procedure *— Sentencing — Disparity of sentences between offenders — When it is possible to pass such a sentence — Principles and guidelines followed*

Criminal Procedure *— Juvenile — Sentencing — Imprisonment — Circumstances when it is appropriate — Juvenile Courts Act 1947 ss 3, 15(2) & 40 — Criminal Procedure Code (FMS Cap 6) ss 173A & 294*

The accused persons pleaded guilty to a charge of culpable homicide not amounting to murder, punishable under the first limb of s 304 of the Penal Code (FMS Cap 45) ('the Code') read together with s 34 of the Code. The first accused was just above 18 at the time and was a first offender. The second accused was 27 years old and had previous convictions. The third accused was a juvenile at the material time and was also a first offender. Among them, the first accused played a major role in the commission of the offence.

Held, sentencing the accused to imprisonment for eight, nine and five years from the date of remand respectively:

(1) While public interest is of utmost importance, the court must also consider the following factors before imposing sentence, namely: discount or credit for the plea of guilty; comparison of sentence in other cases for a similar offence; disparity of sentence amongst the accused persons; and the mitigating factors.

(2) Although the court took into consideration their plea of guilt, considering the serious nature of the offence, the accused should be given a discount of only one-quarter rather than one-third of the sentence which would have been imposed after a full trial. The accused should be given differing lengths of imprisonment apropos to their roles in the perpetration of the crime.

(3) The first and third accused being first offenders, the court should consider how the length of time spent in prison would affect them and society after they complete their sentence. Public interest sometimes demands that a short term of imprisonment be imposed as the prisoner would have difficulty in readjusting to family and community life if a longer term is imposed.

(4) Even though the third accused was a juvenile at the time, dealing with him under s 15(2) of the Juvenile Courts Act 1947 or ss 173A, 293 or 294 of the Criminal Procedure Code (FMS Cap 6) was inappropriate due to the gravity of the offence and the

fact that the third accused was already over 21 at the time of sentencing. Therefore, a prison term was necessary. A

[Bahasa Malaysia summary

Ketiga-tiga tertuduh telah mengaku bersalah terhadap suatu tuduhan homisid salah tidak terjumlah kepada membunuh yang boleh dihukum dibawah cabang pertama s 304 Kanun Keseksaan (FMS Bab 45) ('Kanun itu') dibaca bersama s 34 Kanun itu. Tertuduh pertama baru menjangkau umur 18 tahun pada masa itu dan ini adalah kesalahan pertama beliau. Tertuduh kedua berumur 27 tahun dan mempunyai rekod sabitan lampau. Tertuduh ketiga merupakan seorang juvana pada masa itu dan pesalah kali pertama. Diantara mereka, tertuduh pertama telah memainkan peranan utama dalam melakukan kesalahan tersebut. B C

Diputuskan, memenjarakan tertuduh-tertuduh selama lapan, sembilan dan lima tahun daripada tarikh mereka direman masing-masing: D

(1) Walaupun kepentingan awam adalah faktor yang paling penting, mahkamah harus juga mengambilkira fakta-fakta berikut sebelum menjatuhkan hukuman, iaitu: diskaun atau kredit atas pengakuan bersalah; membandingkan hukuman dalam kes-kes lain bagi kesalahan sama; perbezaan hukuman diantara kesemua tertuduh; dan fakta-fakta meringankan hukuman. E

(2) Walaupun mahkamah telah mengambilkira pengakuan bersalah mereka, ketiga-tiga tertuduh harus diberi hanya satu perempat dan bukannya satu pertiga diskaun daripada hukuman yang sepatutnya dijatuhkan selepas perbicaraan penuh. Tertuduh-tertuduh hendaklah dipenjarakan bagi tempoh yang berbeza setimpal dengan peranan mereka dalam perbuatan jenayah tersebut. F

(3) Bagi tertuduh pertama dan ketiga, oleh kerana mereka adalah pesalah kali pertama, mahkamah sepatutnya menimbangkan bagaimana tempoh dalam penjara akan menjejaskan diri mereka dan juga masyarakat selepas mereka selesai menjalani hukuman itu. Kepentingan awam kadangkala menuntut supaya hukuman penjara yang singkat dijatuhkan oleh kerana banduan akan menghadapi masalah untuk menyesuaikandiri semula dalam kehidupan keluarga dan masyarakat, seandainya hukuman yang lebih panjang dikenakan. G

(4) Walaupun tertuduh ketiga merupakan seorang juvana pada masa itu, s 15(2) Akta Mahkamah Juvana 1947 ataupun ss 173A, 293 atau 294 Kanun Acara Jenayah (FMS Bab 6) tidak sesuai digunakan kerana kesalahan yang dilakukan adalah berat dan juga hakikat bahawa tertuduh ketiga sudah pun menjangkau umur 21 tahun pada masa beliau dihukum. Oleh yang demikian, hukuman penjara perlu dijatuhkan.] H I

Cases referred to

1 *Lee Weng Tuck v PP* [1989] 2 MLJ 143 (folld)

2 *PP v Ravindran & Ors* [1993] 1 MLJ 45 (folld)

A 3 *R v Kenneth John Ball* (1951) 35 Cr App R 164 (folld)
4 *PP v Loo Choon Fatt* [1976] 2 MLJ 256 (refd)
5 *Teo Siew Peng & Ors v PP* [1985] 2 MLJ 125 (refd)
6 *PP v Lim Guan Hock* [1949] MLJ 231 (refd)
7 *PP v Leonard Glenn Francis* [1989] 2 MLJ 158 (refd)
B 8 *Tukiran bin Taib v PP* [1955] MLJ 24 (refd)
9 *PP v Teh Ah Cheng* [1976] 2 MLJ 186 (refd)

Legislation referred to
Juvenila Courts Act 1947 s 15(2)

C *Mohamad Hanafiah bin Zakaria* (Deputy Public Prosecutor) for the prosecution.
Gurbachan Singh (*Bachan & Kartar*) for the first accused.
Kartar Singh (*Bachan & Kartar*) for the second accused.
Murugappan s/o Manikam (*Syarikat KRP Perumal*) for the third accused.

D

Visu Sinnadurai J:

Facts

At the conclusion of the trial, this court took time to consider the appropri-
E ate sentence to be passed on the three accused.

The three accused, Nazarudin ('the first accused'); Aziz ('the second accused'); and Azizul ('the third accused'), were charged in furtherance of the common intention of all of them to commit murder by causing the death of one Francis Adickalam, an offence punishable under s 302 of the
F Penal Code (FMS Cap 45) ('the Code'). All three accused pleaded not guilty and claimed trial. A jury was chosen in accordance with the procedure under the Criminal Procedure Code (FMS Cap 6). The trial then went on for about four days.

On 22 December, the deputy public prosecutor ('the DPP') informed the court that an amended charge was being tendered. The charge of
G murder was reduced to one of culpable homicide not amounting to murder, punishable under the first limb of s 304 of the Code read together with s 34 of the Code. The new charge read as follows:

> Bahawa kamu, di antara jam 11pm, 8 Julai 1989 hingga jam 12.45am, 9 Julai 1989, di satu kawasan lapang berhampiran rumah No 29A, Jalan 8/84, Taman
H Dato' Senu, di dalam Wilayah Persekutuan Kuala Lumpur, dengan niat yang sama, telah melakukan homisid salah tak terjumlah membunuh, dengan menyebabkan kematian Francis a/l Adickalam KP No 8381754(B), dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah cabang pertama s 304 Kanun Keseksaan (NNMB Bab 45), dibaca bersama-sama dengan s 34 Kanun yang sama.

I The charge was then read and explained to each of the accused persons. All three accused persons elected to plead guilty on the reduced charge.

The DPP then read out the following statement of facts pertaining to the new and reduced charge. The facts as presented by the DPP were as follows:

Fakta kes

Pada 9 Julai 1989 jam lebih kurang 1 pagi di Kg Puah Bahagia, Sentul Pasir, Kuala Lumpur, sebuah teksi No Pendaftaran 2104, kepunyaan Kandasamy a/l Perumal, telah ditemui oleh penduduk-penduduk kampung ditinggalkan di tepi sebatang jalan. Semasa itu, pemandu teksi tidak berada di dalamnya dan teksi itu ditinggal dengan pintu tidak berkunci dan kunci berada di 'ignition' nya. Radio di dalam teksi itu juga berpasang dan lampu kecilnya menyala. Penduduk-penduduk kampung mengesyaki sesuatu dan mereka telah berhubung pihak polis.

(2) Sebelum daripada itu, pada hari yang sama, jam lebih kurang 12.45 tengah malam, tidak jauh daripada tempat di mana teksi ditemui, dua orang penduduk kampung iaitu Aziz bin Salleh dan Hj Mohd Noor bin Jantan, telah melihat tiga orang masuk ke bahagian belakang rumah Aziz bin Salleh. Kedua-dua mereka kemudiannya pergi meninjau ke bahagian belakang rumah tersebut dan ketika dalam perjalanan, mereka telah terserempak dengan salah seorang daripada orang tersebut. Orang ini telah dicam oleh kedua-dua Aziz bin Salleh dan Hj Mohd Noor bin Jantan sebagai tertuduh kedua iaitu Aziz a/l P Ajah Mydin Eusoff di dalam kawad cam yang diadakan pada 16 Julai 1989 di Ibu Pejabat Polis Daerah Kuala Kangsar. Dua orang lagi dapat melarikan diri. Apabila ditanya oleh kedua-dua mereka berkenaan sebab tertuduh kedua dan kawan-kawannya berada di situ, tertuduh kedua telah mengatakan mereka hendak kencing. Apabila kedua-dua penduduk kampung itu tidak berpuashati dengan jawapan tersebut, mereka telah memanggil lain-lain penduduk kampung dan ketika ini, tertuduh kedua juga telah melarikan diri.

(3) Pada jam lebih kurang 1.50 pagi, Kpl 31240 Abdul Rasheed bin Mahmood telah menerima arahan daripada Bilik Gerakan Kuala Lumpur supaya pergi ke Kg Puah Bahagian, Sentul Pasar, Kuala Lumpur, berkenaan maklumat terjumpanya sebuah teksi yang ditinggalkan di situ. Pada jam lebih kurang 1.55 pagi, Kpl 31240 Abdul Rasheed telah sampai di tempat yang diarahkan dan telah melihat sebuah teksi No HW 2104 terletak di tepi sebatang jalan tanpa pemandunya. Setelah bertanya berkenaan pemandu teksi itu dan tidak ada sesiapa yang mengaku, beliau telah membawa teksi tersebut ke balai polis Sentul dan telah membuat satu laporan iaitu Sentul Repot No 4663/89. Beliau telah membuat pemeriksaan ke atas teksi itu dan telah menjumpai permit pemandu teksi kedua atas nama Francis a/l Adickalam. Pihak polis kemudiannya telah berhubung dengan alamat yang terdapat pada permit tersebut dan memaklumkan terjumpanya teksi tersebut.

(4) Usaha telah dijalankan untuk mengesan pemandu teksi tersebut. Pihak polis telah dapat berjumpa dengan tuan punya teksi yang bernama Kandasamy a/l Perumal dan mereka telah diberitahu bahawa teksi itu telah dipandu oleh Francis a/l Adickalam (iaitu simati). Usaha telah dijalankan oleh abang simati iaitu Sivanathan a/l Adickalam untuk mencari simati. Pada hari yang sama jam lebih kurang 7.15 pagi, Sivanathan telah pergi mencari simati di Kg Puah Bahagia, Bandar Baru Sentul, Kuala Lumpur. Apabila sampai di satu kawasan lapang

berhampiran rumah No 29A, Jalan 8/84, Taman Dato' Senu, beliau telah menjumpai simati terbaring di atas tanah. Apabila pemeriksaan dibuat didapati simati telahpun meninggal dunia dan mengalami kecederaan di kepalanya. Beliau kemudiannya telah balik ke Balai Polis Sentul dan telah melaporkan hal terjumpanya mayat simati.

(5) Siasatan telah dijalankan oleh Insp Mohd Bakri bin Ghazali. Pada 11 Julai 1989 jam lebih kurang 2.50 petang, ketiga-tiga telah ditangkap oleh anggota-anggota polis dari Balai Polis Manong, Kuala Kangsar di Pengkalan Bot Tambang Pekan Manong, setelah mereka mengelak diri dari melalui sekatan jalan raya yang dibuat di hadapan balai polis tersebut. Setelah ditangkap, mereka telah dibawa ke Balai Polis Manong. Pada hari yang sama jam 4.30 petang, ketika disoal oleh PPP Tung Eng Keong, tertuduh pertama telah memberi maklumat dan hasil daripada maklumat ini, tertuduh pertama telah membawa pihak polis yang diketuai oleh PPP Tung Eng Keong ke tempat di mana tertuduh pertama dan dua tertuduh lain ditangkap. Di sana, tertuduh pertama telah menunjukkan tempat di mana sepucuk revolver dibuang ke dalam sungai sebelum ketiga-tiga mereka ditangkap. PPP Tung Eng Keong telah mengarahkan Insp Mohammed Nor bin Idrus supaya menyelam ke dalam sungai dan Insp Mohammed Nor telah dapat menjumpai sepucuk revolver Smith & Wesson .38 Spl 2 Serial No J 804669, di samping dua barang lain, di dalam sungai itu. Siasatan yang dijalankan oleh PPP Tung Eng Keong mendapati revolver ini adalah berkaitan dengan Ampang Repot No 6696/89. Pada 14 Julai 1989, PPP Tung Eng Keong telah menelefon Insp Mohd Bakri dan memaklumkan berkenaan penemuan sepucuk revolver dan tangkapan ketiga-tiga tertuduh.

(6) Pada 15 Julai 1989, Insp Abu Othman bin Awang, Insp Sheridan Mohd dan Insp Zulkefly telah merakam percakapan amaran daripada tertuduh pertama, tertuduh kedua dan tertuduh ketiga, masing-masing. Pada hari tersebut jam lebih kurang 11 malam mereka telah menahan sebuah teksi yang dipandu oleh simati. Mereka kemudian telah masuk ke dalam teksi itu dan meminta simati membawa mereka ke Sentul. Semasa dalam perjalanan, tertuduh ketiga telah beritahu simati supaya mengikut jalan kampung. Mereka kemudian telah melalui satu kawasan sunyi dan gelap dan tertuduh pertama telah meminta simati menghentikan teksi itu. Ketiga-tiga tertuduh kemudiannya telah keluar daripada teksi dan tertuduh kedua dan tertuduh ketiga telah berpura-pura membuang air kecil manakala tertuduh pertama berpura-pura muntah. Semasa inilah, tertuduh kedua dan tertuduh ketiga mengikut sama. Tertuduh pertama telah mengeluarkan revolver tersebut dari pinggangnya dan telah mengacukan ke arah simati. Tertuduh pertama kemudiannya telah meminta wang dari simati, lalu diberitahu oleh simati bahawa beliau tidak mempunyai wang. Dengan serta merta, tertuduh pertama telah melepaskan satu das tembakan ke bahagian kepala sebelah kanan simati. Mereka kemudianya telah mengeluarkan simati daripada teksi itu dan meninggalkanya di situ. Ketiga-tiga tertuduh kemudianya telah membawa teksi tersebut dari tempat itu. Tidak jauh dari situ, lebih kurang 1km dari tempat berlakunya tembakan, mereka

telah menghentikan teksi itu dan meninggalkanya di tepi jalan. Ketiga-tiga tertuduh kemudian telah berjalan kaki ke arah Bandar Baru Sentul. Dalam perjalanan, mereka telah pergi ke belakang sebuah rumah tidak jauh daripada tempat di mana teksi ditinggalkan untuk buang air kecil. Ketika ini mereka telah terserempak dengan dua orang penduduk kampung dan tertuduh kedua telah ditahan manakala tertuduh pertama dan tertuduh ketiga telah melarikan diri. Tidak lama kemudian, tertuduh kedua juga dapat melarikan diri.

(7) Siasatan polis mendapati bahawa tertuduh pertama telah mencuri revolver tersebut daripada D/Kons 73039 Oh Chu Beng di rumahnya pada 29 Jun 1989. Setelah berjaya mencuri revolver itu, tertuduh pertama telah memberitahu tertuduh kedua dan tertuduh ketiga bahawa beliau mempunyai sepucuk revolver dan mahu menggunakanya untuk merompak teksi. Pada 9 Julai 1989, ketiga-tiga tertuduh telah merancang untuk melakukan rompakan tersebut dengan menggunakan revolver itu.

(8) Pada 10 Julai 1989, lebih kurang 2.15 petang, satu pembedahan siasat telah dijalankan keatas simati oleh Dr Abd Rahman Yusof. Hasil daripada pembedahan tersebut, didapati simati menemui ajalnya akibat kecederaan di kepala yang disebabkan luka akibat tembakan.

(9) Ketiga-tiga tertuduh telah mengaku bahawa mereka terlibat dalam rompakan dengan menggunakan senjatapi milik tertuduh pertama, dan dalam melakukan rompakan tersebut, telah menyebabkan kematian simati apabila tertuduh pertama telah melepaskan satu das tembakan daripada revolver tersebut ke bahagian kepala sebelah kanan simati. Akibat daripada tembakan tersebut, simati telah menemui ajalnya.

After the DPP had read out the facts, the court then asked each and everyone of the accused whether they understood the facts and whether they agreed to it. Each of the accused replied that they did so. They were again asked whether they still maintained their plea of guilt. The court having ascertained that they understood and appreciated the consequences and nature of their plea, recorded their plea of guilt and convicted them accordingly. The procedure, as stated by the Supreme Court in the case of *Lee Weng Tuck v PP*[1] was complied with.

The jury was then also accordingly discharged.

Plea of mitigation

Counsel for each of the three accused then made their plea in mitigation as stated below:

(a) First accused

The first accused who is now 22 years old was merely over 18 years at the time of the commission of the offence. He is a first offender. His mother died during his childhood and generally he had lacked proper parental care. He also lost his brother in an accident and he is now the only surviving son. He has now realized his folly and undertook to turn into a new leaf. By pleading guilty, he submitted that he has saved judicial time and urged this court to take this factor into consideration.

A Counsel for the first accused referred to the case of *PP v Ravindran & Ors*[2] and pleaded that a discount or credit be given for the plea of guilty made by the accused. Counsel, however, admitted that since the first accused played a more active role in the commission of the offence, his sentence should probably be higher to that of the second and third accused.

B (b) Second accused
The second accused was 27 years old at the time of the commission of the offence. He has had previous convictions. He lost his father at his early age and lacked direction in life. Like the first accused, the court was urged to take into account the plea of guilty as an important mitigating factor.

C (c) Third accused
The third accused was a juvenile, slightly over the age of 17 at the time of commission of the offence. He left school whilst he was in Form Five and helped his father in the poultry business. He did not have much guidance from his parents. He is the only son of a family of five. He too, like the other accused, was remorseful and urged this court to consider the plea of guilty as a mitigating factor.

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Counsel for all three accused assisted the court by stating the general principles of sentencing and relied on *PP v Ravindran & Ors*.[2]

The learned DPP urged this court to impose a heavy sentence taking into account the public interest. He urged that public interest demanded a deterrent sentence, especially in the case of the first accused. He pointed out that the victim in this case was an innocent taxi driver.

E

Sentencing principles and guidelines

F The offence for which all three accused had pleaded guilty is one which falls under the first limb of s 304 of the Code. It carries a sentence for a term of imprisonment not exceeding 20 years.

This court had the opportunity in the case of *PP v Ravindran & Ors*[2] to deal with, in detail, the general sentencing principles and guidelines applicable in a similar case where the accused persons had also pleaded guilty to an offence under s 304 of the Code. This court reiterated that one of the most important aspects of sentencing principles is the public interest aspect. The court also pointed out that whilst public interest was of utmost importance, the court also had to consider several other factors in determining the appropriate sentence to be imposed in a particular case. These are:

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(i) discount or credit for the plea of guilty;
(ii) comparison of sentences in other cases for a similar offence;
(iii) disparity of sentence amongst the accused persons; and
(iv) mitigating factors relevant to the present case.

I As these factors have been fully explained in my judgment in *PP v Ravindran & Ors*[2] I do not propose to repeat them here. However, of particular importance to the present case are the following two factors which need to be taken into account in this particular case:

(a) the plea of guilty as a mitigating factor; and
(b) whether there should be disparity of sentence among the accused persons.

The exposition by Hilberg J in *R v Kenneth John Ball*[3] which is now regarded as the locus classicus on this aspect of sentencing principle should be borne in mind:

> Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case.

His Lordship on the importance of a plea in mitigation added:

> It is for these reasons, and with these purposes in view, that before passing sentence the court hears evidence of the antecedents and character of every convicted person. ... The background, antecedents and character of the one (offender) and his whole bearing in court may indicate a chance of reform if leniency is extended, whereas it may seem that only a harsh lesson is likely to make the other stop in his criminal career.

These principles expounded by Hilbury J has been consistently followed by the Malaysian courts: see Hashim Yeop Sani J (as he then was) in *PP v Loo Choon Fatt*;[4] Tan Chiaw Thong J in *Teo Siew Peng & Ors v PP*.[5]

Application of sentencing principles

In applying the accepted principles of sentencing, I come to the following conclusions:

(a) Discount for the plea of guilty
This court is of the view that the plea of guilt by the accused is a consideration which should be taken into account in determining their sentence. However, considering the serious nature of the offence, I hold that the accused persons should be given a discount of one-quarter of the sentence rather than one-third which would be imposed on them had they pleaded not guilty and had been found guilty after a long and protracted trial.

On this aspect of the sentencing principle, it is stated by the leading writer on sentencing, DA Thomas in the most recent edition of *Archbold, Criminal Pleadings, Evidence and Practice 1993* as follows:

> As a general principle, an offender who pleads guilty may expect some credit, in the form of a reduction in the sentence which would have been imposed if he had been convicted by the jury on a plea of not guilty. ... The discount for a plea of guilty is normally allowed even in cases of extreme seriousness. (Para 5–152).

For a fuller discussion on the principles applicable to discount for a plea of guilty, see the observation of this court in *PP v Ravindran*.[2]

(b) Normal sentence
From a review of some similar cases, it would appear from the cases that as a general rule, the appropriate sentence for an offence under the first limb of s 304 of the Code varies from eight to ten years.

(c) Disparity of sentence

From the facts presented by the learned DPP, it is clear that the first accused played a more active role in the commission of the offence. It was he who had the revolver with him (the fact that it had been stolen is not relevant for the present purpose as the first accused had not been charged for this offence before this court nor is there any evidence of conviction in any other court) and it was he who fired the fatal shot killing the innocent taxi driver. Though, generally, as I have said earlier, there should be no disparity of sentences in a case where two or more persons are charged for the same offence, the fact that the culpability of one of them is greater should be borne in mind.

On disparity of sentences, the following principles are stated by Thomas in *Archbold 1993*, referred to above:

> Where two or more offenders are to be sentenced for participation in the same offence, the sentences passed on them should be the same, unless there is a relevant difference in their responsibility for the offence or their personal circumstances. If there are reasons for imposing a particular form of sentence ... on one which does not apply to the other, it is not necessarily wrong to make such an order in respect of one and impose a sentence of imprisonment on the other. (Para 5–169).

(d) First offenders

The first and third accused are young, and they are first offenders. In such circumstances, the court should consider how the length of time spent in prison would affect their own lives and society after they have completed serving the sentence. Sometimes public interest may itself demand that a shorter term of imprisonment is desirable as a long imprisonment term may create more problems to the society as the prisoner would have more difficulties in readjusting himself to family and community life on completion of his prison term. As pointed out in the passage in Cross, *The English Sentencing System* (3rd Ed) at p 141:

> Prolonged and repeated imprisonment is destructive of family relationships and, by encouraging the prisoner's identification with the attitudes of the prison community, increases his alienation from normal society. In addition, long-term institutionalization is all too likely to destroy a prisoner's capacity for individual responsibility and to increase the problems he must face when he returns to society.

(e) Juvenile offender: third accused

I must confess that I have had some difficulty in determining the sentence to be imposed on the third accused. The third accused was under 18 years of age at the time of the commission of the offence. Strictly speaking therefore, he was a juvenile as defined by the Juvenile Courts Act 1947. However, the Juvenile Courts Act 1947 itself provides that a juvenile may be tried individually or jointly with others in the High Court for an offence and if found guilty may be sentenced to a term of imprisonment: see ss 3 and 40.

Though the High Court has the power to try a juvenile, the powers of the High Court in sentencing a juvenile are subject to s 15(2) of the Juvenile Courts Act 1947 (and in offences carrying the death sentence, subject to s 6. Section 15(2) provides as follows:

> No young person shall be sentenced or ordered to be imprisoned if he can be suitably dealt with in any other way whether by probation, fine, or committal to a place of detention, approved school, or Henry Gurney School, or otherwise.

It is true that the High Court has certain discretion as to the nature of the sentence to be imposed. This discretion, however, must be exercised according to the law or accepted sentencing principles. None of the alternatives spelt out in s 15(2) appear to be suitable in the present case. As the third accused is now over 21 years old, sending him to an approved school or committing him to a place of detention is not appropriate.

This court has also considered whether any other sentence, besides imprisonment as provided for in the Criminal Procedure Code (FMS Cap 6) was suitable. For this purpose, the court has considered its powers under ss 173A, 293 and 294 of the Criminal Procedure Code (FMS Cap 6). Quite clearly s 293 is inapplicable as the third accused is not a youthful offender since he is above the age of 16 (see s 3 of the Criminal Procedure Code (FMS Cap 6)). In determining whether this court should invoke s 173A or 293, the court has considered in detail the scope of these sections: see generally the views expressed by Hashim Yeop Sani J (as he then was) in *PP v Loo Choon Fatt*,[1] and the cases referred to therein; Tan Chiaw Thong J in *Teo Siew Peng & Ors v PP*[5]; Thomson CJ in *PP v Lim Guan Hock*;[6] and more recently Edgar Joseph Jr J (as he then was) in *PP v Leonard Glenn Francis*.[7]

In the present case, this court is of the view that as the offence committed by the third accused cannot be classified as one of a 'trivial nature', ss 173A or 294 of the Criminal Procedure Code (FMS Cap 6) cannot be invoked.

In considering these principles, I have not overlooked the following observations of Bellamy J in *Tukiran bin Taib v PP*[8] [at p 25], regarding imprisonment of young offenders: 'It has been stressed by this court that it is very desirable that a young first offender who is between the ages of 17 and 21 should be kept out of prison, if possible.'

I have also been mindful of the following sentencing principle as stated by the leading writer on sentencing, Thomas in his book, on *Principles of Sentencing* (1st Ed) relating to public interest and the young offender. He points out as follows:

> In the case of a young offender there can hardly ever be any conflict between the public interest and that of the offender. The public have no greater interest than that he should become a good citizen. The difficult task of the court is to determine what treatment gives the best chance of realizing that object. That realization is the first and by far the most important consideration.

However, considering the gravity of the offence for which the third accused had pleaded guilty to, I am of the view that a prison sentence is the most appropriate sentence under the circumstances. In so arriving at this conclusion that a prison term is justified, I have been guided by some earlier decisions: *PP v Teh Ah Cheng*[9]; *PP v Loo Choon Fatt*[1]; and *PP v Leonard Glenn Francis*.[7]

Sentence

Taking all these above factors into consideration, I now impose the following sentence on the three accused persons:

A (a) First accused

Taking into account that the first accused was, so as to speak, the 'ring leader' of this group of persons and that it was he who had planned and executed the commission of this grave offence, his culpability in the commission of the offence is greater. I would, in such a circumstance, had it not been for the plea of guilty, sentenced him to a period of 12 years imprisonment. However, after taking into account the discount for the plea of guilt and also his age (he was just over 18 years at the time of the commission of the offence), and the fact that he is a first offender, I sentence the first accused, Nazarudin bin Ahmad to a term of imprisonment for eight years. This sentence is to run from the date of remand.

C (b) Second accused

From the facts of the case, it would appear that the second accused was, like the third accused, influenced by the first accused to participate in the commission of the offence. Taking into account the plea of guilty and the discount to be given for such plea, but considering the fact that he was an D adult at the time of the commission of the offence and that he should have played a more important role in guiding the other two accused against the commission of the offence, I also sentence the second accused, Aziz Ajah Mydin Eusoff to a term of imprisonment for nine years to be effective from the date of remand. I have, in the case of the second accused also in passing this sentence taken into account that he has had previous convictions.

E (c) Third accused

After careful consideration of the age of the youth, he being the first offender, and the seriousness of the offence and also the fact that he, like the other two accused had pleaded guilty, I sentence the third accused, Mohd Azizul Baharin to a term of imprisonment of five years. This sentence is to run from the date of remand.

F The third accused has made a request to this court that he be sent to the Taiping prison instead of Kajang. Though strictly speaking, this court has no power to stipulate the prison where a convicted person should be sent to, considering the age of the accused and that his family is from Taiping, I G would recommend to the prison authorities that he be sent to the Taiping prison. Visitation and constant contact by the family are crucial for a person of such young age serving a prison sentence. A term of imprisonment in such a situation without constant family contacts may have the adverse social problem of making a person of such youth and immaturity become a hard core criminal.

H *Order accordingly.*

Reported by Aslam Zainuddin

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